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VIA HAND DELIVERY

October 28, 2002

EX PARTE

RECEIVED

OCT 2 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket Nos. 01-337, 02-33. 98-10, 95-20; DA 02-2140

Dear Ms. Dortch:

On October 25,2002, Dave Baker, Vice President, EarthLink, and the undersigned met with the following Commission staff Dan Gonzales, Legal Advisor to Commissioner Martin; Michelle Carey (Division Chief, Competition Policy Division, Wireline Telecommunications Bureau ("WTB")), Brent Olson (Deputy Division Chief, Competition Policy Division, WTB), Cathy Carpino (WTB), Jeremy Miller (WTB), and Harry Wingo of the FCC's Office of General Counsel; John Rogovin, James Carr, Andrea Keamey, and Harry Wingo of the FCC's Office of General Counsel; Matthew Brill, Acting Senior Legal Advisor to Commissioner Abernathy and Stacia Dixon of Commissioner Abemathy's office; William Maher (Chief, WTB), Jeffrey Carlisle (Senior Deputy Bureau Chief, WTB), and Brent Olson.

In these meetings, EarthLink reiterated several points that it made in previously filed comments and reply comments in the above-referenced dockets, as well as some of the points explained in the attached five-page bullet-sheet presented to staff at each of the meetings. Specifically, EarthLink discussed the importance of Title II and ***Computer Inquiry*** rules for ISPs to obtain wholesale DSL service from incumbent LECs, and the legal underpinnings ofthe common carrier status of incumbent LEC services. EarthLink further explained that as difficult as it is today for independent ISPs to establish nondiscriminatory bulk DSL access arrangements with incumbent LECs, a reversal of ISP access rights would make access arrangements even more difficult to establish in the future. Notwithstanding claims by ILECs that it is in their economic interest to sell bulk DSL to independent ISPs on *nondiscriminatory* rates terms and conditions even ifcurrent access rules are amended, ILECs have yet to volunteer the terms of such allegedly market-driven arrangements in a deregulated environment. EarthLink is not aware of any such arrangements. EarthLink stated that independent ISPs provide the public with diverse broadband information service choices, but that independent ISPs have a small share of the high-speed Internet access market (and smaller ISPs even less) relative to BOC-affiliated

ISPs. In EarthLink's view, while Title I regulation of incumbent LEC-provisioned wholesale DSL may be possible, it would impose much greater legal uncertainty and business risk for ISPs than continued Title II jurisdiction over DSL services, including the DSL services self-provisioned by ILECs to their affiliated ISPs. Instead, EarthLink would propose that the FCC retain Title II jurisdiction over ILEC-provisioned DSL, including core *Computer Inquiry* requirements, while streamlining current *Computer Inquiry* regulations applicable to broadband.

EarthLink also discussed that BOCs continue to have market power over the necessary wholesale transport for ISPs to provision high-speed Internet access, even in those areas where cable access is available. BOCs continue to exercise that market power. Examples of this include Verizon's disparate and discriminatory pricing of its PARTS and lnfospeed DSL services and Amentech's effective predatory pricing of high-speed Internet access through year-long below wholesale "promotional" pricing. In some of the meetings, EarthLink distributed EarthLink's October 2, 2002 letter regarding PARTS/Infospeed DSL pricing (attached) and EarthLink's September 9, 2002 letter regarding Ameritech high-speed Internet pricing (previously filed with the Commission in CC Dkt. No.s 02-33, 01-337). Further, in some of the meetings EarthLink handed out the attached analysis of BellSouth's existing ADSL pricing flexibility to demonstrate that FCC rules already provide the BOCs with a path for substantial price deregulation. In EarthLink's view, the BOCs have failed to demonstrate in the record how *Computer Inquiry* obligations are a significant burden on their services, including how comparably efficient interconnection obligations impair the deployment of IP or broadband Internet services. Finally, in the meeting with Mr. Maher, EarthLink provided a brief overview of its business, including its broadband subscriber base.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, ten copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,

Mark J. O'Connor
Counsel for EarthLink, lnc

CC: Matthew Brill
Dan Gonzales
William Maher
Jeffrey Carlisle
Michelle Carey
John Rogovin
Brent Olson
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Cathy Carpino
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Ex Parte Presentation

October 2,2002

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Verizon Tariff F.C.C. Nos. 1, 11 and 20. Transmittal No. 232: DA-2140

Dear Ms. Dortch:

In support of its request filed August 30, 2002, EarthLink, Inc. ("EarthLink") submits this letter to show that Verizon's PARTS ("Packet at Remote Terminal Service") PVC service is discriminatory in violation of Sections 201 and 202 of the Communications Act because it is offered at a substantially different recurring charge from Infospeed, a pre-existing, similar Verizon service. Because any differences between PARTS and Infospeed are insufficient to justify the significant disparity in recumng charges, EarthLink requests the Commission to designate this issue for investigation and reject Verizon's Transmittal No. 232 ("PARTS Tariff").

At a September 12, 2002 meeting with staff members from the Pricing Policy Division of the Commission's Wireline Competition Bureau (*ex parte* notice filed September 13, 2002), EarthLink stated that the PARTS service and the Infospeed service were essentially the same service offered at different recurring charges to different customers. Staff members urged EarthLink to describe in detail any differences between the two services and price out those differences so that an "apples-to-apples" comparison was possible.

In this letter, EarthLink provides just such a step-by-step analysis. When the differences between the services are accounted for, there is still a minimum recumng charge differential of approximately $15.19 per month per end-user.

What the Two Services Have In Common

Both PARTS and Infospeed DSL provide a DSL connection from the end-user's network interface device ("NID") to the Verizon Central Office (CO).[1] Both services allow customers io serve end-users via remote terminals ("RTs").[2] Both services provide a private virtual connection ("PVC") at base speeds of 768 Kbps/128 Kbps and are available on a month-to-month basis without volume or term commitments. Neither service includes transmission across the ATM network.

Where the Two Services Differ

After bringing the traffic to the Verizon CO, Infospeed cames the traffic to "an Asynchronous Transfer Mode Cell Relay Service (ATM) switch, which serves as an aggregation point for multiple wire centers."[3] This aggregation point may or may not be in the wire center that serves the end-user. In contrast to Infospeed, PARTS transports the traffic via a cross-connect to the customer's collocation arrangement in the end-user's serving wire center.[4] This difference is illustrated in Figures I and 2, below.

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[1] *See* Verizon Notice of Ex Pane Presentation (September 26, 2002) Slide 3 (PARTS Data Only); *see, also,* Verizon Tariff FCC No 20, Pan III, § 5.1.1.D ("Infospeed Tariff').

[2] During the September 12 meeting, there was some question whether lnfospeed did, in fact, reach end-users served by RTs EarthLink has researched this question and confirmed that it does. *See, e.g.*, Declaration of Gregory P Collins, ¶ 2 ("Collins Declaration") (Attachment A hereto). Indeed, prior to Verizon's filing of Transmittal No. 232, lnfospeed was its only wholesale DSL offering. (Infospeed DSL Solutions I and II have been discontinued. Part II, §§ 5.7 and 5.8). Accordingly, had lnfospeed not served end-users through RTs, Verizon's RTs would have been useless for DSL, even io its own affiliated ISP.

[3] Verizon Transmittal 1076 (filed September 1, 1998), Section 1 (Description and Justification) ai I (Attachment B hereio)

[4] Venzon requires that a CLEC purchasing PARTS must also purchase a collocation arrangement in the end-user's serving wire center PARTS Tariff, § 16.9.1.A. However, Verizon provides the Infospeed service without requiring a collocation arrangement, thereby confirming that there is no technical reason to require the collocation arrangement lnfospeed Tariff, § 5.1.I.A. Accordingly, it is appropriate in this analysis to omit the recurring cost io the CLEC of renting the collocation arrangement.

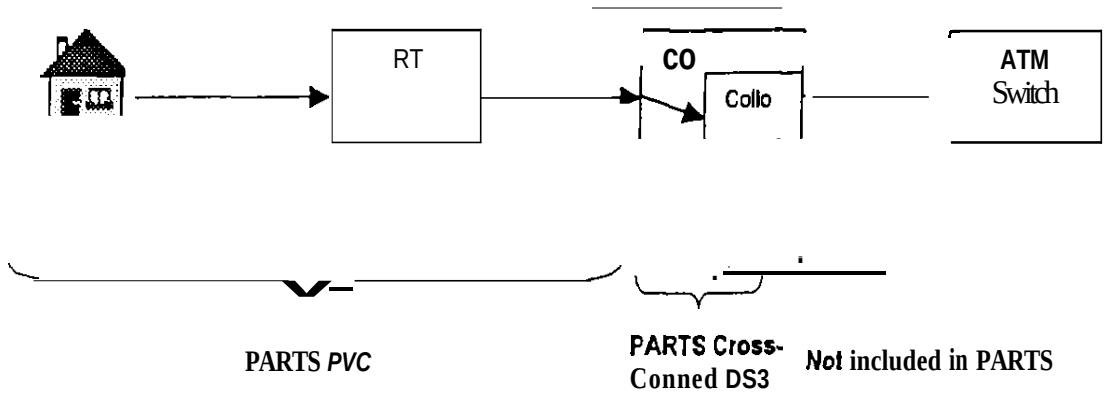
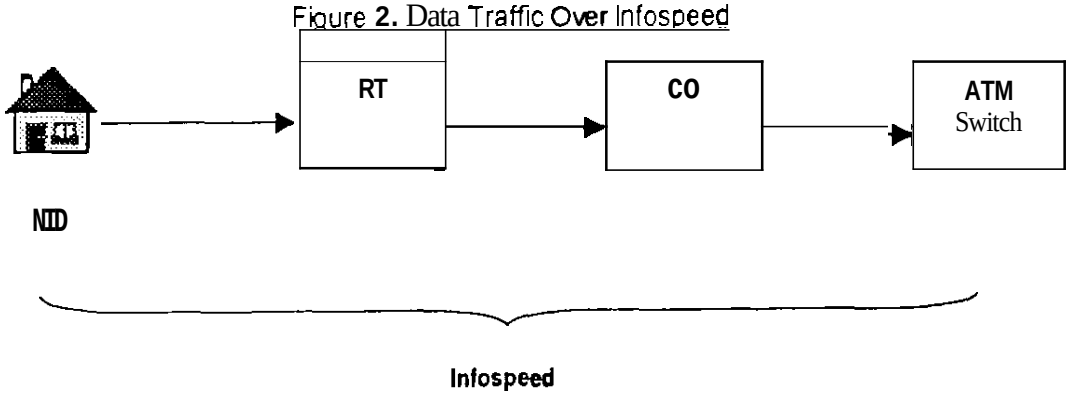


Figure 2. Data Traffic Over Infospeed



The PARTS recurring charge without volume or term commitments for the **768** Kbps/128 Kbps product is **$2**1.00 per month per end-user, **plus** $1 50.00per month per DS3 port and **cross-connect**.[5] Infospeed's recurring charge without volume or term commitments for the **768** Kbps/128 Kbps product is **$39.95** per month.[6] With a five-year, million-line commitment, the Infospeed recurring charge is $29.95.[7] According to Verizon, the Infospeed recurring charge recovers an annualized portion of 11.25% of the service's non-recurring costs and associated

[5] PARTS Tariff, § 31.17.4.
[6] Infospeed Tariff, § 5.1.6.A
[7] Infospeed Tariff, § 5.1.6.C.

profit;[8] the recurring charge for PARTS does not recover any of the service's non-recumng charges.[9]

Finally, PARTS allows service *only* to end-users who are served by RTs; Infospeed allows service to end-users via both RTs and central offices.

Comparing Apples to Apples

The Services' Functionalities

Because lnfospeed transports the traffic to the ATM switch and PARTS only carries to the collocation arrangement, adding a transport service to PARTS to carry the traffic to the ATM switch allows an apples-to-apples comparison of the services. Such transport is available in Verizon's Tariff 20 under a number of possible provisions, including **ATM** Cell Relay **Service** (Pan I, § 5 5), Exchange Access Asynchronous Transfer Mode Cell Relay Service I (Part I, § 5.9), Exchange Access Asynchronous Transfer Mode Cell Relay Service II (Part I, § 5.I0), Asynchronous Transfer Mode Network Service I (Part II, § 5.5), and Asynchronous **Transfer** Mode Network Service II (Part II, § 5 6).[10] Each of these services brings traffic lo the ATM switch on the ATM network, just as Infospeed does.

Most of the rates for these ATM transport services are mileage-sensitive and depend upon the distance between the collocation arrangement and the wire center designated as an ***ATM*** hub **by** Verizon. Most rates are presented in escalating mileage tiers, with accompanying escalating rates This analysis uses the UNI ("user network interface") DS3 option.

[8] Verizon Transmittal No. 1076 (filed September 1, 1998), Workpaper 1, line 9.
[9] Verizon Transmittal No. **232** (filed **August** 9, 2002), **Workpaper** I.
[10] Because it is unclear which ***ATM*** service Verizon would require a CLEC purchasing PARTS to obtain, all current ATM services in Verizon Tariff F.C.C. No. **20** are listed, and, as described below, **EarthLink** has selected the most expensive service for purposes of this analysis. Enterprise **ATM** Cell Relay Service (Pan I, § **5** 6) is a grandfathered service no longer available *to* **new** customers, and thus excluded from this analysis. (Part I, § 5.6.1).

Figure 3. UNI Monthly Rate for DS3

ATM Cell Relay Service

Tier 1 (0-5 miles):	$2891.00 recurring
Tier 2 (5-25 miles):	$4704.00 recurring
Tier 3 (25-50 miles):	$7891.00 recurring

Exchange Access Asynchronous Transfer Mode Cell Relay Service I

Non-mileage-sensitive	$3700.00 recurring

Exchange Access Asynchronous Transfer Mode Cell Relay Service II

Tier 1 (0-5 miles):	$2890.00 recurring
Tier 2 (5-25 miles):	$3955.00 recurring
Tier 3 (25-50 miles):	$6640.00 recumng

Asynchronous Transfer Mode Network Service I

Non-mileage-senslim	$1210.00 recurring (includes $340 UNI + $870 Level of Service)

Asynchronous Transfer Mode Network Service II

Non-mileage-sensitiw	$1210.00 recurring [includes $340 UNI + $870 Level of Service)

Given the above menu, the most expensive connection linking the PARTS service in the collocation arrangement to the Verizon ATM switch aggregator is the Tier 3 ATM Cell Relay Service offering at $7891.00 per month. Specifically, this service is called "UNI Port with Access Line Connection," and it is "a dedicated digital line that provides a link from Customer's premises to one of Company's ATM CRS hubs." Verizon Tariff F.C.C. No. 20, Part I, § 5.5.1.[11]

Although three different mileage tiers are provided, this analysis uses the $7891.00 figure, which assumes that *all* of the distances involved will be ai least 25 miles. In reality, efficient

[11] When Venzon provides transport to the ATM switch as part of its Infospeed service, it will share the transport facility, such as a DS3, among ISPs purchasing Infospeed, putting traffic for many ISPs on a single DS3. Verizon will fill the DS3 with PVCs, thus increasing efficiency and decreasing cost per PVC. Collins Declaration, ¶ 8. Thus, this analysis properly assumes that a PARTS CLEC purchasing ATM transport service over a DS3 to the Verizon ATM switch would likewise use the DS3 capacity efficiently, filling it with PVCs to the same extent that Verizon would.

deployment dictates that most end-users will be served by wire centers located very close to the ATM switch.[12] In any event, adding the ATM Cell Relay Service UNI Port with Access Line Connection DS3 to the PARTS service cames the data traffic just as far as Infospeed does: from the NID to the ATM switch on Verizon's ATM network.[13]

The Services' Recurring Rates

The PVC portion of PARTS is priced on a monthly recumng per-end-user basis ($21.00 each), as is Infospeed ($39.95 each). However, both the DS3 cross-connect portion of PARTS and the ATM Cell Relay Service UNI Port with Access Line Connection DS3 is not, thus complicating the price comparison. The DS3 price is translated to a per-end-user rate by dividing that rate by 3,000, which is the number of PVCs (equivalent to end-users) that a DS3 carries.[14] Accordingly, dividing the $150.00 monthly recurring rate for the PARTS cross-connect by 3,000 equals $0.05 per PVC or end-user. Dividing the $7891.00 recumng rate for the ATM Cell Relay Service UNI Port with Access Line Connection DS3 by 3,000 equals $2.63 per PCV or end-user. Adding $0.05 and $2.63 to the PARTS PVC recumng monthly charge of $21.00 totals a NID-to-ATM switch recurring rate of $23.68.

The Infospeed recurring rate also recovers a portion of the service's non-recumng costs, as well as a mark-up on those costs.[15] The recumng rate for PARTS, however, does not recover any non-recurring costs.[16] To compare recurring rates, adjustment *must* be made for the non-recumng costs recovered by Infospeed's recumng rate. In its Infospeed rate justification filing, Verizon explained that it included an annualized 11.25% of its non-recumng cost in its recumng rate. Since the non-recumng monthly charge in that filing was $99.00 (including the mark-up),[17] the amount of non-recurring cost and associated mark-up that was included in the recumng charge (88.75% of $99.00) was $1.08. Accordingly, the lnfospeed monthly recumng rate, excluding all non-recurring elements, is $38.87 ($39.95 minus $1.08).

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[12] Collins Declaration, ¶ 5.
[13] Collins Declaration, ¶ 7.
[14] Collins Declaration, ¶ 6.
[15] Verizon Transmittal No, 1076 (filed September 1, 1998), Workpaper 1, line 9. It is appropriate to rely on the 1998 Infospeed cost justification because the recumng and non-recumng charges are the same today as they were in 1998.
[16] Verizon Transmittal No. 232 (filed August 9, 2002), Workpaper 1.
[17] Verizon Transmittal No. 1076 (filed September 1, 1998), Workpaper 2.

Different Prices for the Same Services

As the above analysis reveals, a CLEC can purchase PARTS and DS3 transport to the ATM switch (even assuming that switch is *always* over 25 miles away from the end-user's serving wire center) for approximately $23 68 per month per end-user. *An* ISP, which Venzon Will not permit to purchase PARTS, must obtain Verizon DSL via the lnfospeed offering, for which Verizon charges an effective recurring rate of $38.87 per month per end-user. Whether the customer is a CLEC paying $23.68 or an ISP paying $15.19 more, the service Verizon provisions is exactly the same: the data traffic is carried from the end-user's NID, through the Remote Terminal, to the Verizon ATM switch."

As EarthLink stated in its August 30* letter, Sections 201 and 202 of the Communications Act forbid Verizon from charging a significantly different and higher recumng Infospeed rate for essentially the same service as offered in PARTS." Accordingly, EarthLink urges the Commission to designate for investigation the question of whether the PARTS recumng charge is discriminatory in light of Verizon's lnfospeed offering.

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[18] Although the Infospeed recurring rare also applies to end-users served through COs, rather than RTs, *this* difference suggests only that the lnfospeed recurring rate is lower than it would be if lnfospeed served end-users only through RTs, since serving an end-user through a CO is less costly than serving one through an RT. Collins Declaration, ¶ 3.

[19] *See, In rhe Matter of AT&T Communications Revisions to Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 7 FCC Rcd. 156, ¶ 7 (CCB 1991) (Commission initialed investigation of AT&T tariff upon finding that "customers are to be charged different rates for what is otherwise the same service . . . . Such apparent discrimination in the terms and conditions of service raise serious questions of compliance with the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a)"); *In the Matter of Revisions to Southwestern Bell Tel. Co., Tariff F.C.C. No. 68,* Order, 4 FCC Rcd. 2624 (CCB 1988) (FCC rejects tariff on the basis, in pan, that "[u]ltimately, the proposed tariff revisions could result in different customers paying different rates for the same service.").

In accordance with the Commission's *ex parte* rules, attached please find two copies of this letter for filing in the above-referenced docket. Should you have any questions regarding this matter, please feel free to contact the undersigned.

Sincerely,

Mark J. O'Connor
Kenneth R. Boley
Counsel for EarthLink, Inc

cc: Judith Nitsche
Chris Barnekov
Deena Shetler
Margaret Dailey
Jay Atkinson
lames Lichford
Vienna Jordan
Eugene Gold

ATTACHMENT **A**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, **DC 20554**

In the Matter of
Verizon Transmittal No. 232. DA-2140

DECLARATION OF GREGORY P. COLLINS

My name is Gregory P. Collins, and I declare that the following statements are true and accurate to the best of my knowledge:

1. I am Director of Network Engineering and Operations for EarthLink, Inc., a position I have held since September 2000. Prior to that I was Director of Technical Operations at OneMain.com, a position I took in February 1998. My current business address is 8320 East Walker Springs Lane, Suite 100, Knoxville, Tennessee 37923.

2. Verizon currently offers digital subscriber line ("DSL") service to Internet Service Providers ("ISPs") via an offering called Infospeed. Infospeed provides ISPs DSL access to end-users who are served through remote terminals ("RTs") as well as those served through central offices ("COs") but not RTs.

3. Because most RT traffic is routed through a CO, it would be more costly for Verizon to provide service to an end-user served through an RT than it would be to provide service to an end-user served through a CO but not through an RT.

4. For an entity purchasing transport to the ATM switch for data traffic delivered to its collocation arrangement over Verizon's PARTS service, it would not be necessary to purchase PVCs in connection with the ATM transport. Rather, the PARTS service provides the PVCs, and those PVCs would flow over the ATM transport from the collocation arrangement to the ATM switch.

5. Although it is not necessary that every CO or serving wire center have an ATM switch aggregator, such ATM switches, or "hubs," would be located in or near COs that receive the greatest amount of traffic bound for the **ATM** network. This would minimize transport to the ATM switch and improve efficiency, and is likely the way Verizon has designed its network. Thus, the distance traffic must travel from the collocation arrangement of a CLEC purchasing PARTS to the ATM switch will, in most cases, be very short.

6. In my experience, a DS3 facility is easily capable of carrying 3,000 PVCs. This would apply to DS3 transport from the collocation arrangement of a CLEC purchasing PARTS to the Verizon ATM switch. In this situation, each PVC is equivalent to one DSL end-user.

7. Based upon my understanding of Verizon's ATM service offerings, the PARTS tariff and associated materials, and Verizon's Infospeed service, it is my opinion that the ATM Cell Relay Service UNI Port with Access Line Connection, once added to the PARTS service, brings the data traffic to the same point as does Infospeed. That point is the ATM switch on Verizon's ATM network.

8. When Verizon provides transport to the ATM switch as part of its Infospeed service, it is my experience that it will share the transport facility, such as a DS3, among entities purchasing Infospeed. Verizon will carry traffic for many different customers on a single DS3. Verizon will fill the DS3 with PVCs, thus increasing efficiency and decreasing cost per PVC.

I declare that the foregoing is true and correct to the best of my knowledge.

Gregory P. Collins

October 2, 2002